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F3M1/1010

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| EXAMINER | |
|---|---|
| | |
| **ART UNIT** | **PAPER NUMBER** |
| 3302 | |

DATE MAILED: 10/10/96

**Please find below a communication from the EXAMINER in charge of this application.**

Commissioner of Patents

| Office Action Summary | Application No. 08/432,280 | Applicant(s) French et al. |
|---|---|---|
| | Examiner Lynne A. Reichard | Group Art Unit 3302 |

☒ Responsive to communication(s) filed on *Jul 26, 1996* .

☒ This action is **FINAL.**

☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

A shortened statutory period for response to this action is set to expire *3* month(s), or thirty days, whichever is longer, from the mailing date of this communication. Failure to respond within the period for response will cause the application to become abandoned. (35 U.S.C. § 133). Extensions of time may be obtained under the provisions of 37 CFR 1.136(a).

**Disposition of Claims**

☒ Claim(s) *27-32* is/are pending in the application.

Of the above, claim(s) _____ is/are withdrawn from consideration.

☐ Claim(s) _____ is/are allowed.

☒ Claim(s) *27-32* is/are rejected.

☐ Claim(s) _____ is/are objected to.

☐ Claims _____ are subject to restriction or election requirement.

**Application Papers**

☐ See the attached Notice of Draftsperson's Patent Drawing Review, PTO-948.

☐ The drawing(s) filed on _____ is/are objected to by the Examiner.

☐ The proposed drawing correction, filed on _____ is ☐ approved ☐ disapproved.

☒ The specification is objected to by the Examiner.

☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. § 119**

☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).

☐ All ☐ Some* ☐ None of the CERTIFIED copies of the priority documents have been

☐ received.

☐ received in Application No. (Series Code/Serial Number) _____ .

☐ received in this national stage application from the International Bureau (PCT Rule 17.2(a)).

*Certified copies not received: _____ .

☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

**Attachment(s)**

☒ Notice of References Cited, PTO-892

☐ Information Disclosure Statement(s), PTO-1449, Paper No(s). _____

☐ Interview Summary, PTO-413

☐ Notice of Draftsperson's Patent Drawing Review, PTO-948

☐ Notice of Informal Patent Application, PTO-152

*--- SEE OFFICE ACTION ON THE FOLLOWING PAGES ---*

The listing of references in the Amendment, Paper No. 8, is not a proper information disclosure statement. 37 CFR 1.98(b) requires a list of all patents, publications, or other information submitted for consideration by the Office, and MPEP § 609 A(1) states, "the list may not be incorporated into the specification but must be submitted in a separate paper." Therefore, unless the references have been cited by the examiner on form PTO-892, they have not been considered.

**Objections to the Specification**

The specification is replete with grammatical errors too numerous to mention specifically. The specification should be revised carefully.

**Objections to the Claims**

Misnumbered Claims

The numbering of claims is not accordance with 37 CFR 1.126. The original numbering of the claims must be preserved throughout the prosecution. When claims are canceled, the remaining claims must not be renumbered. When claims are added, except when presented in accordance with 37 CFR 1.121(b), they must be renumbered consecutively beginning with the number next following the highest numbered claims previously presented (whether entered or not).

Misnumbered claims 1-6 have been renumbered 27-32.

Improper Multiple Dependent Claims

Claims 31 and 32 are objected to under 37 CFR 1.75(c) as being in improper form because a multiple dependent claim cannot depend from another multiple dependent claim. See MPEP § 608.01(n). Accordingly, the claims 31 and 32 have not been further treated on the merits.

**Rejections Under 35 U.S.C. § 112, second paragraph**

Claims 27-32 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

With regard to claim 27, it is unclear what the phrase "Rigid guide means" refers to. Examination of the specification reveals no use of this terminology. Element 32 is disclosed as being "slightably attached to the platform"; however, the specification fails to disclose any "guide" for accomplishing this attachment and does not disclose that element 32 is "connected to the front end of the platform". Accordingly, the claim is indefinite and the limitations set forth in section "d." of claim one cannot be treated on the merits. Additionally, in line 9 the phrase "the treadmill" lacks positive antecedent basis and should be -the treadmill means-. Applicant is reminded that consistent terminology must be used throughout the claims. Claims 28-32 depend from claim 27 and likewise are indefinite.

With regard to claim 29, the preamble recites that claim 29 depends from claim 27; however, claim 29 refers in line 6 to "the center pivot point" an element which is set forth in claim 28 not claim 27. As claim 29 does not make sense unless it depends from claim 28, the Examiner

has assumed that claim 29 depends from claim 28 and not claim 27. Furthermore, in line 4 it is unclear what the phrase "a first end and a second end" refers to and in lines 11-13 the third flexible linkage is claimed as having a second end without reciting that it has a first end. Claims 30-32 depend from claim 29 and likewise are indefinite.

**Rejections Under 35 U.S.C. § 102**

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless --
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claim 27 is rejected under 35 U.S.C. 102(b) as being anticipated by Leonaggeo, Jr.

In regard to claim 27, Leonaggeo, Jr. discloses an aquatic therapy tank apparatus for holding water and having jets of water injected into the tank at a desired water flow rate for providing aquatic therapy and exercise comprising: a tank (10) for retaining water, said tank having a front end, a back end, two opposing sides, and a bottom affixed to the ends and sides so as to allow it to hold water; elongated treadmill means (24) in said tank situated between the front end and back end with driving means (42) for rotating the treadmill means and having means (pump control mechanism not shown, column 5 lines 16-19) for adjusting the speed of rotation; elongated platform means (20) for supporting the treadmill means, said platform means having a front end near the front end of the tank and a back end near the back ends of the tank; and lifting means (70) attached to the rigid guide means for lifting the platform and treadmill. Applicant

should further note that Leonaggeo, Jr. discloses a "rigid member" (72) "slightably attached to the platform" as disclosed in the instant specification.

**Rejections Under 35 U.S.C. § 103**

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claim 28 is rejected under 35 U.S.C. 103(a) as being unpatentable over Leonaggeo, Jr. in view of Scribner.

As to claim 28, Leonaggeo, Jr. discloses additional means (72, 74, 78, and 78) for supporting the platform and treadmill in the tank comprised of at least two elongated rigid supporting members each having two opposing ends. Leonaggeo, Jr. discloses a lifting means comprising two scissor sections rather than a single scissor section as disclosed by the instant invention. Leonaggeo, Jr. further discloses one member (74) that fixed to the platform, one member (72) that is slidable along the platform, one member (78) that is fixed to the bottom of the tank, and one member (76) that is slidable along the bottom of the tank. Scribner teaches the use of a lifting mechanism for raising and lowering the bottom of a pool comprising a single scissor section wherein the two elongated rigid members are pivotably connected to each other near the center at a center pivot point. Furthermore, the mechanical equivalence of single and multiple section scissor lifts is well known in the art. It would have been obvious to one of

ordinary skill in the art to modify the device disclosed by Leonaggeo, Jr. to use a single section scissor lift in view of the teaching of Scribner and as such practice is conventional in the art.

Claim 30 is rejected under 35 U.S.C. 103(a) as being unpatentable over Leonaggeo Jr. in view of Crandell.

As to claim 30, Leonaggeo, Jr. discloses a tank having a plurality of jet nozzles in at least one side through which water flows at the desired rate of flow into the tank. Leonaggeo, Jr. does not address the specifics of the jet nozzles, but in column 6 lines 1-18 indicates that the jet nozzles are of a conventional type. Crandell teaches that conventional jet nozzles have means for adjusting the water flow rate means comprised of a water pump pumping at a rate responsive to the amount of electrical current to the pump and having means for adjusting the amount of electrical current provided to the pump. It would have been obvious to one of ordinary skill in the art to use conventional nozzles of the type taught by Crandell in the Leonaggeo, Jr. device.

**Indication of Allowable Subject Matter**

Claim 29 would be allowable if rewritten to overcome the rejection(s) under 35 U.S.C. 112 set forth in this Office action and to include all of the limitations of the base claim and any intervening claims.

**Response to Arguments**

Applicant's arguments filed July 26, 1996 have been fully considered but they are not persuasive.

Applicant has argued that Leonaggeo, Jr. fails to disclose "a platform for supporting the treadmill that is affixed at its front end to external lift means"; however, there is no such limitation recited in the claims. Applicant has further argued Leonaggeo, Jr. fails to disclose a "center pivot point". While it is true that Leonaggeo, Jr. fails to disclose a "center pivot point" such is taught by Scribner. Additionally, Applicant has argued that Leonaggeo, Jr. fails to disclose "flexible linkages". Applicant's argument in this regard is persuasive, hence claim 29 has been indicated to be allowable.

Applicant has argued that the rejections under 35 U.S.C. § 103 based on Leonaggeo, Jr. in view of Crandell are improper; however, it is unclear what basis Applicant is relying on for this argument. The examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 19880; *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Leonaggeo, Jr. itself teaches that the jet nozzles are conventional. Crandell is relied upon to illustrate that the features claimed are features of conventional jet nozzles.

Finally, in response to applicant's argument that the examiner has combined an excessive number of references, reliance on a large number of references in a rejection does not, without more, weigh against the obviousness of the claimed invention. *In re Gorman*, 933 F.2d 982, 18

USPQ2d 1885 (Fed. Cir. 1991). Additionally, Applicant should note that the combination of three or four references is generally not considered to be excessive.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for response to this final action is set to expire THREE MONTHS from the date of this action. In the event a first response is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event will the statutory period for response expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication should be directed to Lynne A. Reichard at telephone number (703) 308-1159. Additionally, any facsimile transmissions concerning this application should be directed to Lynne A. Reichard at fax number (703) 308-2864.

**LYNNE A. REICHARD**
**PRIMARY EXAMINER**
**GROUP 3302**

Lynne A. Reichard
October 1, 1996